UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHELE WARGO,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-47-P-H***
	)	
WAL-MART STORES, INC.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, Wal-Mart Stores, Inc., moves for summary judgment in this action alleging harassment and discrimination based on her pregnancy. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record

in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The plaintiff was employed as a sales associate at the Wal-Mart in Sanford, Maine, from on or about October 1, 1997 until February 20, 1998. Defendant's Statement of Material Facts as to Which There is No Genuine Issue of Material Fact ("Defendant's SMF") (Docket No. 8) ¶ 1; Plaintiff's Opposing Statement of Material Facts as to Which There is No Genuine Issue of Material Fact ("Plaintiff's Responsive SMF") (Docket No. 10) ¶ 1. She was employed full time as an associate in the sporting goods and automotive departments. *Id*. She was pregnant during the entire time she worked at Wal-Mart. *Id*. ¶ 2.

The plaintiff indicated on her employment application that she was available to work days, nights and weekends. *Id*. ¶ 3. She understood that full-time sales associates were expected to work days, evenings and weekends. *Id*. At some point, the plaintiff requested schedule changes so that she would only work days, submitting a note from her doctor indicating that this request was due to her pregnancy. *Id*. ¶ 4. This request was denied after Wal-Mart telephoned the plaintiff's doctor. *Id.* The

plaintiff also requested a schedule change to work days only because she needed to take care of her grandmother. *Id*. ¶ 6. This request was also denied. *Id*.

Michael Vieira was employed as one of three assistant managers at the Sanford Wal-Mart during the time the plaintiff worked there. *Id*. ¶ 12; Plaintiff's Additional Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF) ¶ 32; Defendant's Reply to Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue of Material Fact ("Defendant's Responsive SMF") (Docket No. 14) ¶ 32. The plaintiff contends that Vieira called her "Hormones" five or six times a day for the entire time that she worked at Wal-Mart. Defendant's SMF ¶ 13; Plaintiff's Responsive SMF ¶ 13. She testified that when she asked Vieira to stop calling her "Hormones," he laughed and walked away. *Id*. ¶ 16. Vieira testified that he only called the plaintiff "Hormones" once or twice, after stating something to the effect that she was in a bad mood because her hormones were kicking in, as they had with his wife when she was pregnant. *Id*. ¶ 14. The plaintiff testified that Vieira began addressing her this way within the first week of her employment. Defendant's SMF ¶ 13; Plaintiff's Responsive SMF at 1-2. She testified that she went to Gary Voss, the store manager, during the second week of her employment to complain about this and went to him again for the same reason in each of the next three weeks, and that Voss told her he would take care of it. *Id*. Vieira testified that Voss spoke to him once about this, asking him to stop calling the plaintiff by this name. Plaintiff's SMF ¶ 57; Defendant's Responsive SMF ¶ 57.

The plaintiff found nothing other than Vieira's use of the word "Hormones" offensive about her working environment. Defendant's SMF ¶ 17; Plaintiff's Responsive SMF ¶ 17. The plaintiff was aware of Wal-Mart's Open Door Policy that allows an employee to go to any member of management to address concerns. *Id*. ¶ 20. She testified that on two occasions when the district manager for Wal-Mart visited the Sanford store she was not allowed to leave her department to speak to him because

there was no one else working in her department at the time. *Id*. There is a poster in the employee lounge of the Sanford Wal-Mart with the district manager's phone number on it. *Id*. ¶ 28. The plaintiff did not make any other complaints about Vieira or seek a shift change or transfer to another Wal-Mart. *Id.* ¶ 21.

The plaintiff's fiancé went to the Sanford Wal-Mart on February 16, 1998 and told a representative of the store that the plaintiff would not be coming to work that day. *Id*. ¶ 9. The other subject matter of this conversation is in dispute, but later that day the Sanford police told the plaintiff's fiancé that he was not allowed on the premises of the Wal-Mart. *Id*. The plaintiff received a written counseling memo for excessive absenteeism on or about February 17, 1998. *Id*. ¶ 8. The plaintiff decided to end her employment on February 20, 1998. *Id*. ¶ 10. The plaintiff's fiancé remembers her begging him not to force her to go back to work that day. Plaintiff's SMF ¶ 66; Defendant's Responsive SMF ¶ 66. The plaintiff testified that she decided to quit when Vieira called her "Hormones" when she was checking out for lunch that day. *Id*. ¶ 72.

Vieira is no longer employed by Wal-Mart. Defendant's SMF ¶ 30; Plaintiff's Responsive SMF ¶ 30. He was demoted and transferred by Voss on September 1, 1998 because he left a safe unlocked and for productivity reasons. Plaintiff's SMF ¶ 46; Defendant's Responsive SMF ¶ 46. He left Wal-Mart in February 1999 for another job. *Id*. ¶ 50.

The plaintiff filed a complaint against Wal-Mart with the Maine Human Rights Commission and the Equal Employment Opportunity Commission ("EEOC") on or about May 8, 1998. Charge of Discrimination, copy attached to Defendant's Motion to Dismiss Plaintiff's Verified Complaint (Docket No. 4) at 1.

III. Discussion

The defendant contends that the plaintiff has not provided evidence sufficient to allow her claims to proceed to trial; that the plaintiff was not constructively discharged; that the defendant's reasonable care to prevent sexually harassing behavior coupled with the plaintiff's failure to take her complaints about Vieira higher in the Wal-Mart organization after Voss failed to stop Vieira's offensive behavior bars her claims; and that she has failed to exhaust her administrative remedies as to any claims of sexual harassment and hostile work environment, requiring the entry of summary judgment for the defendant on any such claims.

The complaint alleges sexual harassment, discrimination based on gender and pregnancy, and creation of a hostile work environment in violation of the Maine Human Rights Act ("MHRA"), specifically 5 M.R.S.A. § 4572, and the federal Civil Rights Act of 1964, often called Title VII, specifically 42 U.S.C. §§ 2000e(k) & 2000e-5(g)(1). Complaint (included in Docket No. 1) at 3-4. The relevant portion of the state statute provides:

> It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:
>
> **A**. For any employer . . . because of race or color, sex, physical or mental disability, religion, age, ancestry or national origin . . . to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment . . . .

5 M.R.S.A. § 4572(1). The subsection of section 2000e-5 cited by the complaint addresses only the relief available for victims of an unlawful employment practice under the federal act, and the cited subsection of section 2000e defines the terms "because of sex" or "on the basis of sex" to include pregnancy. Presumably, the plaintiff means to invoke as the basis of her federal claim 42 U.S.C. § 2000e-2(a), which provides in pertinent part:

> It shall be an unlawful employment practice for an employer —

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Maine has also included pregnancy within the coverage of its discrimination statute. 5 M.R.S.A. § 4572-A(1). This court must interpret the MHRA in a manner consistent with analogous federal discrimination law. *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596, 606 (D. Me. 1994).

A. Procedural Matters

The defendant's motion for summary judgment addresses all of the claims raised in the complaint, but the plaintiff's objection to the motion limits its discussion to the claim of a hostile working environment. Plaintiff's Response to Defendant's Motion for Summary Judgment, etc. ("Plaintiff's Response") (Docket No. 9) at 7-12. Accordingly, the plaintiff's claims of sexual harassment and discrimination based on sex and pregnancy, which are conceptually distinct from the hostile environment claim, must be considered waived, *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990), and will not be considered further here.[1] It thus becomes necessary to consider the defendant's contention that the plaintiff may not assert a claim of hostile work environment because she failed to present such a claim in her administrative complaint. *See* 42 U.S.C. § 2000e-5(f)(1).

[1] If I were to reach the merits of these claims, I would in any event recommend the entry of summary judgment for the defendant. Plaintiffs claiming discrimination on the basis of gender or pregnancy in violation of Title VII may proceed on a theory either of disparate treatment or disparate impact. *Smith v. F. W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996). The complaint in this case cannot be read to allege disparate impact. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). A claim of sexual harassment, the only type of discrimination alleged here, is a disparate treatment claim. An adverse employment action is a necessary element of a claim of sexual harassment, unless the harassment claim is one for creation of a hostile work environment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988). Here, the only adverse employment action asserted by the plaintiff is a constructive discharge, which may serve as proof of that element. *Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000). In such cases, the plaintiff must prove that the employer imposed working conditions so intolerable that a reasonable person would feel compelled to resign. *Id.*; *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 731 (1st Cir. 1999). The plaintiff must demonstrate "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992), cited with approval in *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 48 (1st Cir. 1998). While Vieira's repeated use of an offensive nickname, as reported by the plaintiff, is offensive and may well have created a hostile working environment, as discussed *infra*, and the fact that the plaintiff subjectively felt compelled to resign is undisputed, the evidence in the summary judgment record would not allow a jury to find that a reasonable person in the plaintiff's position would have felt compelled to resign when she did.

The defendant moved to dismiss the complaint on this ground earlier in this proceeding, and Judge Hornby denied the motion "because of the breadth of the factual allegations in the complaint filed with the MHRC." Endorsement, Defendant's Motion to Dismiss Plaintiff's Verified Complaint ("Motion to Dismiss") (Docket No. 4) at 1. The only difference between the defendant's argument on this point at this time and its argument in support of its motion to dismiss, *compare* Defendant's Motion for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 7) at 12-13 *with* Motion to Dismiss at 8-9, is a reference to the plaintiff's deposition testimony. The defendant contends that the plaintiff "admitted" that she did not allege in her complaint to the Maine Human Rights Commission that she was subjected to a hostile work environment. Defendant's Motion at 12; Defendant's SMF ¶ 26. At her deposition the plaintiff was asked by defense counsel, "You did not make a claim at the Maine Human Rights Commission that there was a hostile work environment at Wal-Mart?" Deposition of Michele Wargo, submitted with Defendant's SMF ("Plaintiff's Dep."), at 134. She responded "No," and, after testifying that she understood what the term "hostile work environment" meant, again stated that she did not make that claim "at the Maine Human Rights level." *Id*.

The plaintiff's objection to the motion for summary judgment does not address the question whether a plaintiff, unschooled in the law, may by testimony waive a claim that the court has already found to be encompassed within her administrative complaint when exhaustion of administrative remedies is a necessary precondition to presentation of that claim to the courts for resolution. That is the only basis upon which the defendant could succeed on this argument given the procedural status of the issue. I conclude that it would be unfair to lay plaintiffs to allow sophisticated defense counsel to eliminate claims otherwise appropriately raised by questioning such plaintiffs about what are essentially legal conclusions. The interests of justice would not be served by such an outcome. In this instance, it is the written administrative complaint itself that governs, not the plaintiff's understanding

of that document. This court has already ruled on the legal sufficiency of that document to raise a claim of hostile work environment so as to allow the plaintiff to proceed with that claim in this court.

B. The Merits

"When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal punctuation and citation omitted). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." *Id*. "[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee" does not sufficiently affect the conditions of employment to implicate Title VII. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cited with approval in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). The First Circuit recently set forth the elements of a hostile work environment claim as follows:

> To make out a hostile work environment claim, the plaintiff must show . . . (1) that the plaintiff was exposed to comments, jokes or acts of a [discriminatory] nature by the defendant's employees; and (2) that the conduct had the purpose or effect of interfering with the plaintiff's work performance or created an intimidating, hostile or offensive working environment.

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 16 (1st Cir. 1999).

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offense utterance; and whether it unreasonably interferes with an employee's work performance.

Harris, 510 U.S. at 23.

The defendant contends that Vieira's alleged conduct cannot form the basis for a finding of hostile work environment as a matter of law because the only conduct alleged is the utterance of an

offensive name. Defendant's Motion at 1-3, 4-6. However, this is too simplistic a view of the case law interpreting the federal statutory prohibition. When an unwelcome and offensive name or epithet is directed at the plaintiff five or six times every working day, Plaintiff's Dep. at 102-03, over the plaintiff's clearly stated objection, *id*. at 32, the work atmosphere can become infected with something more than "simple teasing, offhand comments and isolated incidents." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). While it is a close question, I conclude that a jury could reasonably find that Vieira's conduct, viewed objectively and as described by the plaintiff, created a hostile work environment for her. *See, e.g.*, *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 260, 264 (5th Cir. 1999) (five instances of crude sexual comments, four of which also involved gestures, present "close question" on motion for summary judgment on hostile environment claim); *Duplessis v. Training & Dev. Corp.*, 835 F. Supp. 671, 677 (D. Me. 1993) (incidents must be repeated and continuous to establish hostile environment). The defendant is not entitled to summary judgment on this basis.

The plaintiff relies on the same evidence to support her claim of constructive discharge, perhaps enhanced by her testimony that Voss ignored her complaints about Vieira's conduct. As noted above, I have already concluded that this evidence is insufficient to allow the plaintiff to proceed with her claim of constructive discharge. This does not end the matter, however.

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807. Here, the defendant contends that the evidence establishes this affirmative defense as a matter of law, because "Wal-Mart clearly posted its policies and provided training to its employees." Defendant's Motion at 12. However, if a jury chose to credit the plaintiff's testimony, it could reasonably conclude that the failure of Voss, the store manager, to act on the plaintiff's repeated complaints about Vieira's conduct did not constitute "reasonable care to . . . correct promptly any sexually harassing behavior," and it could also reasonably conclude that the plaintiff's failure to contact Voss's supervisor, the district manager, see Defendant's SMF ¶ 20, was not unreasonable when the "policy" at issue merely stated that "if you have . . . a problem, you can go to your Coach to talk about it . . . . You can go up to each level of management, including our company's top leaders, with your . . . concern," Paragraph headed "Open Door — Open Mind" in Wal-Mart Associate Handbook, Exh. 12 to Plaintiff's Dep., at 11, and the plaintiff was not allowed to speak to the district manager on two occasions when he was at the Sanford store, Plaintiff's Dep. at 65-66.

Disputed issues of material fact remain with respect to the defendant's asserted affirmative defense. It is not entitled to summary judgment on this basis.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to any claims other than a claim for hostile work environment discrimination based on gender or pregnancy, and specifically that it be **GRANTED** as to any claim that the plaintiff was constructively discharged, and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 17th day of August, 2000.

David M. Cohen
United States Magistrate Judge

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